WHITE PAPER ON

PENDING LEGISLATION REGARDING THE IMPOSITION OF A $3 PER TON "SURCHARGE" ON GENERATORS OF SOLID WASTE

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About the Michigan Chamber of Commerce

The Michigan Chamber of Commerce is a statewide business organization which represents more than 6,300 employers, trade associations and local chambers of commerce. The Michigan Chamber was established in 1959 to be an advocate for Michigan's job providers in the legislative, political and legal process.

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About Jaffe, Raitt, Heuer & Weiss, P.C.

JaffeRaitt was founded in 1968 by four attorneys with a vision and desire to create a law firm dedicated to providing innovative and responsive legal services. This entrepreneurial spirit has fueled the firm's rapid growth to some 85 attorneys and continues to drive the firm to meet the needs of clients, large and small. The lawyers on the JaffeRaitt team strive to be a primary resource and partner in all aspects of client businesses, whether the firm is structuring a merger, acquisition, or commercial real estate transaction, handling a complex litigation matter, or otherwise addressing client goals. Based at One Woodward Avenue in Detroit, the firm also has offices in Ann Arbor, Birmingham and Port Huron.

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I. Executive Summary

Proposed legislation to establish a $3 per ton "surcharge" on solid waste should be rejected by the Michigan Legislature. The surcharge proposed is an invalid, unstated tax. It will be used to fund activities unrelated to the regulation of waste disposal and unrelated to any service provided to landfills, haulers or even generators of waste. Instead, it will be used to fund a new $50 million government program to support recycling and to reduce dumping. For the surcharge to be a legal surcharge/fee, a corresponding benefit must be granted to the person paying it, which is not shared by other members of society, such as a hunter paying for the processing of his application for a hunting license. Because here, no corresponding benefit is provided to the person paying the surcharge, and because the money generated will be used to benefit the general public, the surcharge is really a tax in disguise.

In addition to being an illegal tax, the surcharge violates the United States Constitution and international treaties (such as NAFTA). The legislation, while arguably non-discriminatory on its face, very clearly is intended to decrease the amount of solid waste transported into Michigan from Canada and other states. Under the Commerce Clause, states may not enact legislation that would impair the free flow of interstate and international commerce, of which solid waste is a part. Additionally, because out-of-state solid waste generators are paying into a fund from which they receive absolutely no benefit, while their domestic counterparts receive substantial benefits such as tax incentives, the legislation violates well-settled Commerce Clause principles. As such, the legislation cannot withstand Commerce Clause scrutiny and should not be enacted.

The legislation also violates free trade principles adopted by the federal government when it signed the North American Free Trade Agreement, the General Agreement on Tariffs and Trade and the 1986 Canada-United States Agreement on the Transboundary Movement of Hazardous Waste (amended in 1992 to include solid waste). Each of these agreements requires the United States to permit the free flow and movement of products between Canada and the United States, including solid waste. The legislation not only violates these specific agreements, it legislates in an area where only Congress has the power to legislate.

Finally, there are questions about the surcharge's effects including, but not limited to, increasing dumping rather than decreasing it, impacting Michigan's recovering economy, and not directing funding to the most cost-effective and productive recycling and anti-dumping programs.

II. Introduction

In September of 2003, the Michigan Senate Republicans unveiled a comprehensive report offering recommendations to improve recycling in Michigan. The report entitled, "The Michigan Beverage Container and Recycling Task Force Report," contained over 40 recommendations designed to promote and enhance recycling in Michigan. One of the more questionable recommendations calls for the enactment of a $3 per ton surcharge on commercial and residential waste.

According to public testimony before the Beverage Container Task Force, the $3 per ton surcharge will accomplish two goals: 1) it will provide funding for recycling programs; and 2) it will help discourage out-of-state waste. This "White Paper" outlines why the imposition of a $3 per ton surcharge will not accomplish either of these stated goals because it will violate Michigan law, the U.S. Constitution and international treaties.

Legislation – Senate Bill 721 and House Bill 4152 – has been introduced to fund recycling and litter prevention education by collecting a $3 per ton "surcharge" from each solid waste generator (i.e. business or individual) disposing of solid waste in Michigan. Expanded recycling and litter prevention is a worthwhile goal, but this legislation is too burdensome on Michigan residents and businesses who are already struggling in this economy.

This legislation[4] should not be enacted because there are a plethora of other ways to increase recycling participation and litter awareness without risking the crippling of Michigan businesses and residents. Additionally, if the legislation is enacted as drafted, Michigan courts will strike it down as, among other things, a disguised and impermissible tax, or a federal court will strike it down for violating the Federal Constitution or international treaties.

III. The Basics Of The Legislation

Senate Bill 721 establishes a "waste diversion surcharge" which is nominally assessed on generators of solid waste. The surcharge is $3.00 for each ton of municipal and commercially generated solid waste (that which is generated by businesses or residents) disposed of in a landfill or a municipal solid waste incinerator ("MSWI"). The owner or operator of a landfill or an MSWI would be required to collect the surcharge from persons delivering the solid waste. The solid waste hauler that delivers solid waste to a landfill or MWSI must collect the surcharge from the generator of the solid waste. The landfill owner is then to forward the surcharge to the Department of Environmental Quality ("MDEQ"). The MDEQ then forwards surcharges to the state treasurer for deposit into a "recycling and waste diversion fund." The legislation also lists eight categories of waste to which a surcharge will not attach.[5]

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[4] As a starting point, we reviewed various drafts of SB 721 and HB 4152, but the concepts discussed in this document apply to any surcharge or fee proposed to be assessed and collected through the waste disposal process.

[5] (1) construction and demolition waste or debris; (2) industrial waste; (3) sludge; (4) ash, the source of which was already subject to the surcharge; (5) manufacturing process waste; (6) cement kiln dust; (7) remediation waste; and (8) foundry sand.

The legislation would create the "recycling and waste diversion fund" in the state treasury and the state treasurer would direct the investment of the fund. Money in the fund would be used as follows:

1. At least 85% of the money must be distributed by MDEQ to counties as follows (unless the legislature adopts a different allocation):

   a. 10% is earmarked to go to counties with a waste diversion plan approved by the MDEQ.

   b. 90% of the money shall be distributed on a "per capita" basis to each county with a waste diversion plan which are then to be distributed by each county to programs that will "most cost effectively": (1) increase the amount and types of residential and commercial recycling; (2) increase the number of individuals participating in recycling efforts; (3) "recognize" recycling investments; (4) provide new recycling opportunities; and (5) distribute funding according to population.

      This may include, in the first year of the program, the use of $75,000 per county for their preparation of the waste diversion plan.

2. At most, 5% of the money in the fund will be used to conduct a comprehensive study of littering problems in the State of Michigan and to develop and administer a marketing program designed to reduce littering;

3. At most, 1% of the money shall be used by the MDEQ to administer the distribution to counties – this 1% will also be used to pay for the expenses of the recycling advisory council; and

4. 10% of the money will be transferred annually into the recycling incentives fund which is to reimburse the general fund for SBT tax incentives to encourage recycling.

In short, all of the money in the waste diversion fund will be used for litter prevention and/or incentives for recycling.

IV. The Surcharge Is Really A Tax Which Would Be Stricken By Any Court

A. The Surcharge Is An Illegal Tax Under Michigan Law

1. The Legal Standard

Courts have used a three-part test to determine if an assessment is a fee or really a tax in disguise. In 1998, the Michigan Supreme Court, in *Bolt v Lansing*, 459 Mich 152 (1998), stated that there are three criteria which demonstrate that a charge is a fee rather than a tax: 1) the fee serves a regulatory purpose rather than a revenue raising purpose; 2) user fees must be proportionate to the necessary cost of the service; and 3) the fee must be voluntary. *Id.* at 161-62. (*See also Mapleview Estates, Inc v City of Brown City*, 258 Mich App 412, 415 (2003, and *Graham v Kochville Twp,* 236 Mich App 141, 156 (1999), holding that a connection charge is a fee rather than a tax because it serves a regulatory purpose, is proportionate to the necessary cost of the service and is voluntary.)

In *Bolt*, a Lansing ordinance created a storm water service charge without getting the necessary voter approval required by the Headlee Amendment. Const 1963, Art 9, § 31. The money collected was used to defray the cost of a $176 million program implemented to avoid the combination of wastewater with storm water drains in the Lansing area. Plaintiff was billed $59.83 for his parcel of property which represented his pro rata share of the storm water service charge. Plaintiff filed suit alleging that this service charge violated the Headlee Amendment because it was a tax. The Court of Appeals concluded that the storm water service charge did not violate the Headlee Amendment because it was not a tax but was instead a valid user fee. The Supreme Court reversed and found the charge to be an invalid tax.

The Supreme Court stated:

> Determining whether the storm water service charge was properly characterized as a fee or a tax involves consideration of several factors. ***Generally, a 'fee' is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. . . . Exactions which are imposed primarily for public rather than private purposes are taxes.*** Revenue from taxes, therefore, must inure to the benefit of all, as opposed to exactions from a few for benefits that will inure to the persons or group assessed.

Id. at 161 (internal citations omitted) (emphasis added).

The Court then applied the three criteria. With respect to the first criterion, the Court stated:

> to be sustained [as a regulatory fee], the act we are here considering must be held to be one for regulation only, and not as a means primarily of producing revenue. Such a measure will be upheld by the courts when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost of issuing a license, and the regulation of the business to which it applies.

Id. at 163 (internal citations omitted). The Court held that because the "surcharge" was not structured to simply defray the cost of a regulatory activity but rather was used to fund a public improvement designed to provide a long-term benefit to the city and all of its citizens, the fee was really a tax. *Id.* at 163-64. The Court also stated that because the amount the city received was disproportionate to the city's benefit, in terms of infrastructure, it had to be a tax. *Id.* The Court recognized that for this charge to be a fee, it must reflect a corresponding benefit on the person paying the charge "which benefit is not generally shared by other members of society." *Id.* at 165.

The Court concluded that because the benefit of the charge was shared by those not paying for the charge, the charge was a tax. In addressing the third factor, the Court noted that this fee lacked any element of volition. *Id.* at 167-168.[6]

In summing up, the Court stated:

> The distinction between a fee and a tax is one that is not always observed with nicety in judicial decisions, but according to some authorities, any payment exacted by the state or its municipal subdivisions as a contribution toward the cost in maintaining governmental functions, where the special benefits derived from their performance is merged in the general benefit, is a tax.

Id. at 165-66; citing 71 Am Jur 2d, State and Local Taxation, § 15, p 352.

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6 The *Bolt* court relied heavily on a 1994 report of a Gubernatorial Blue Ribbon Commission charged to study the so-called Headlee Amendments to the Michigan Constitution. That Report specifically stated:

> The practice of imposing "mandatory user fees" has been most commonly applied to recycling programs, particularly in the suburban Detroit area, in recent years...
>
> The argument that the governments make on their behalf is that these "fees" are not taxes simply because they fund a specific activity or function that is beneficial to the public. The Commission does not disagree that many such activities are beneficial to the public, and applauds the use of true user fees to finance certain public services. However, the proliferation of taxes under the guise of user fees requires action by the State before the Constitutional voter-approval requirement for new local taxes becomes effectively meaningless.
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> There is no distinction between taxes and user fees based on the benefits of the service. All government services benefit somebody, and virtually all have been defended as benefiting society as a whole. The debate over which benefits are worth the sacrifice of higher taxes is an essential part of our democratic society. The connection between benefits and the payment is generally tighter for those services purchased by true user fees, since the user decides each time whether the benefits are worth the fee.
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> A "fee for service" or "user fee" is a payment made for the voluntary receipt of a measured service, in which the revenues from the fees are used only for the service provided. Examples include municipal sewer charges, lottery tickets, park entry fees, parking tickets, per-bag charges for garbage pick-up, court fees, and license and permit fees. Fines levied for violations of laws are user fees, since the violator chose to behave in a manner that could result in a fine.
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> The Commission specifically identifies three unconstitutional abuses of Section 31: "mandatory user fees" levied on property to fund local government recycling services; "charges" levied on telephone service under 1986 PA 32 to fund emergency telephone systems; and "special assessments" which fund operating expenditures of local units of government.

See also The Headlee Amendment, a Study Report by the Michigan Law Revision Commission, December 31, 1998 ("In general a fee is exchanged for a service rendered or a benefit conferred. A fee is distinguishable from a tax in that a fee provided there is some reasonable relationship between the amount of the fee and the value of the service or benefit.").

2. The Surcharge Is An Illegal Tax Under Michigan Law

Under Michigan law, the legislation would not satisfy the *Bolt* test and cases interpreting *Bolt.* The legislation does not satisfy the first inquiry - whether the charge serves a regulatory purpose rather than operates as a means of raising revenue. Here it is very clear that the charge imposed by the legislation is to raise revenue. Specifically, the money generated will be put into the state treasury. The charge will fund are to fund recycling and litter prevention, both designed to benefit the general public. There is no regulatory purpose here. This fee is unlike the seven-cent per ton solid waste program administration fee charged landfills and MSWI's to support such MDEQ functions as:

a) Preparing generally applicable guidance regarding the solid waste permit and license program or its implementation or enforcement.

b) Reviewing and acting on any application for a permit or license, permit or license revision, or permit or license renewal, including the cost of public notice and public hearings.

c) Performing an advisory analysis under MCL 324.11510(1).

d) General administrative costs of running the permit and license program, including permit and license tracking and data entry.

e) Inspection of licensed disposal areas and open dumps.

f) Implementing and enforcing the conditions of any permit or license.

g) Groundwater monitoring audits at disposal areas which are or have been licensed.

h) Reviewing and acting upon corrective action plans for disposal areas which are or have been licensed under this part.

i) Review of certifications of closure.

j) Postclosure maintenance and monitoring inspections and review.

k) Review of bonds and financial assurance documentation at disposal areas which are or have been licensed.

MCL 324.11525a and 324.11550. These are charges that relate to regulatory activities.[7] The charges proposed do not in any way relate to the regulation of solid waste generators or disposal areas. These funds are not used to license, permit, inspect or enforce laws against generators or disposal areas. The funding of programs to direct generators' waste out of the waste stream does not "regulate" the generators but, in fact, sets government in place to give generators a competing option for their waste. *See, e.g., Grunow v Township of Frankenmuth*, 2002 WL 31376376 (Mich App

[7] Based upon the most recent waste disposal figures, it appears that the State will receive roughly $4 million to support these activities.

2002). This will be a significant increase in the cost of state government at a time when there is widespread agreement that growth in state government spending must be limited or constrained.

While laudatory, recycling and litter prevention programs serve the greater public and not those upon whom the surcharge is truly imposed. Therefore, funds to support them cannot be raised through the surcharge now proposed. Additionally, the money raised by the surcharge exceeds the cost of any program regulating disposal areas because those costs are already fully funded as described above.

Further, while one might argue that the fee is voluntary because all one has to do is dispose of no waste, there are two obvious responses to that. The first is that such a result is unrealistic – waste will be disposed of. Given the universality of waste generation, such a paradigm shift effectively renders the fee involuntarily applied. Second, the attempt to make this a charge on the generator is simply a ruse to try and avoid the fact that this charge will be paid by the landfills and incinerators. Thus, it is without a doubt that this surcharge is a tax and not a fee. As a result, under the Michigan Constitution, it will be invalid.

B. Courts In Other States Have Already Found That Surcharges, Like The One Here, Are Taxes Rather Than Fees

The Sixth Circuit has already addressed that a per ton surcharge on solid waste is a tax rather than a fee. *American Landfill, Inc v Stark,* 166 F3d 835 (CA6 1999). In *American Landfill*, the state of Ohio enacted legislation that allowed waste districts to levy an assessment on persons disposing of material at solid waste disposal facilities. The assessments were to be collected by the owner or operator of the facility on a tonnage or cubic yardage basis. The funds were to be used for strikingly similar purposes to the legislation at issue here including the preparation and implementation of a solid waste management plan; the development and implementation of solid waste recycling programs; assisting to enforce littering and open dumping laws; and providing funding to conduct studies for water analysis. *Id.* at 836. Plaintiff sued defendant solid waste district to recoup money it paid through the assessments. As a jurisdictional matter, the district court ruled that the assessments were "taxes" and not "fees." *Id.* at 837. The Sixth Circuit affirmed.

The Sixth Circuit recognized first that taxes are assessed for revenue purposes while fees are assessed for regulatory or punitive purposes. The court stated: "When the ultimate use is to provide a general public benefit, the assessment is likely a tax, while an assessment that provides a narrow benefit to the regulated companies is likely a fee." *Id.* at 838, *citing Bidart Bros v California Apple Comm'n*, 73 F3d 925, 931 (CA9 1996). The court then recognized that the United States Supreme Court has differentiated between a tax and a fee in many different situations and noted, in particular, *National Cable Television Ass'n v United States*, 415 US 336 (1974), where the Supreme Court stated:

> [t]axation is a legislative function...[wherein the legislature may] disregard benefits bestowed by the Government on a taxpayer...A fee, however, is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society.

American Landfill, 166 F3d at 838, *quoting National Cable*, 415 US at 340-41.

The Sixth Circuit concluded that the solid waste per ton assessment was really a tax, even though the money collected was kept in a separate fund, because the money in the fund "serves public purposes benefiting the entire community." *Id.* at 839.[8]

The Court's ruling in *American Landfill* makes it very clear that because the surcharge will be used for public purposes and is not voluntary, it will be held to be a tax by a Michigan and/or federal court. There is no benefit bestowed upon anyone paying the fee and the only benefit runs solely to society in general. Another case, from the Fourth Circuit reaches the identical result when reviewing an identical solid waste assessment scheme. In *Valero Terrestrial Corp v Caffrey*, 205 F3d 130 (2000), West Virginia law imposed a "solid waste assessment fee" on generators of solid waste of $3.50 per ton. The money used from the fund was to be used to help West Virginia landfills meet closure standards promulgated by the Environmental Protection Agency. *Id.* at 133. The court held that because the assessment would be used for the "general benefit of . . . the community," the assessment was a tax instead of a fee. 205 F3d at 136. Contrast that fee, which was charged against waste going into a landfill and would be used to pay for landfill-related expenses, to the legislation's surcharge, which will be charged the same way and have ***absolutely nothing*** to do with disposal facilities thereafter.

In light of *Bolt*, *American Landfill* and *Valero*, it is without question that the surcharge at issue here will be deemed a tax rather than a fee. It is, therefore, imperative that the Legislature go through all of the measures necessary to collect a tax, including stating the tax, before enacting any such legislation. As Article IV, Section 32 of the Michigan Constitution provides, "[e]very law which imposes, continues or revives a tax shall distinctly state the tax." Without stating the tax, any legislation imposing the proposed surcharge would be constitutionally invalid.

V. Public Policy Does Not Favor Enactment Of The Proposed Legislation

The legislation has as its stated goals the creation of new and better recycling programs and decrease dumping. While these goals are worthwhile, the unintended consequences of a landfill surcharge may lead to more public harm than good.

A. The Legislation May Harm Michigan Businesses And Residents

Governor Granholm in her State of the State address on January 27, 2004 emphasized that: "Michigan *will* attract and keep good jobs." (Emphasis in original). She then discussed her seven-point plan for creating "a Michigan that *is* the economic powerhouse state of the 21st century." (Emphasis in original). This legislation will have the opposite effect. The increase in costs to Michigan's businesses and residents may actually encourage businesses to leave the state and further damage Michigan's economy. If enacted, the legislation will force businesses and individuals to shift to the state treasury money which they once would have funneled into Michigan's economy. Thus, this legislation will retard, rather than stimulate Michigan's economy.

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[8] This Court used a slightly different three-part test: (1) what entity imposes the charge; (2) what population is subject to the charge; and (3) what purposes are served by the use of the monies. Applying this test, the proposed fee is even more clearly a tax.

It is estimated that $50 million will be paid annually to the state as a result of this legislation. In fact, based on the most recent waste summary generated by the MDEQ, this figure may be closer to $60 million – $46 million of which will be paid by Michigan taxpayers, residents and businesses! This money could be better spent elsewhere by businesses – such as creating new jobs, investing in research and development, providing better employee health and retirement benefits, creating and implementing employee training programs and providing employee education incentive programs. All of these would help Michigan's lagging economy. Also, individuals will be forced to pay this "surcharge" which could be used to purchase goods and services supporting Michigan businesses. Instead, this money is earmarked to go into the coffers of the State Treasury to promulgate and expand recycling efforts and litter education. While these efforts are laudable, there are other ways to promote recycling and litter prevention without taxing struggling Michigan businesses and residents.

B. Permissible Ways Exist To Raise Revenue For Recycling And Litter Prevention

Recycling initiatives already exist in this State that have not triggered lengthy and costly litigation. The Urban Cooperation Act of 1967 ("PA 138") allows each county government to assess a $25 per year fee on households to support recycling. MCL 124.508a. An expansion of PA 138, (House Bill 5236 or Senate Bill 937) which leaves recycling initiatives at the county level and requires the county commission to place the issue before the voters of the county, would be more focused and less taxing on Michigan businesses and residents. The critical point is that the decision to collect and use this money is made locally and is therefore much more desirable than a flat "surcharge" imposed statewide on every business and resident. Also, it will allow the counties to develop recycling plans and then raise only the funds necessary to accomplish those plans. There has been no explanation of the need for $50 million to support these programs. That amount of money may be well more than is needed.

Additionally, many recycling and littering education programs have been implemented around the country that have not charged a per ton fee. For example, 24 states have plans to create recycling awareness by giving tax breaks and/or credits to those businesses and/or individuals who recycle. *See* U.S. Environmental Protection Agency website, State Recycling Tax Incentives, at www.epa.gov/;tr/bizasst/rec-tax.htm. These programs have been successful without charging businesses and individuals a per ton fee. Michigan already has an incentive plan under the Single Business Tax Act. The Legislature could build on these incentives and PA 138 to create a different bill that incentivizes recycling and decreases dumping.

Finally, the proposed legislation's scheme of allocating funds to any county that submits a plan for recycling, while laudable, is likely not the most effective way to gain the greatest recycling benefit in the most cost-effective way. Rather than funding 83 recycling plans (at a cost of up to $75,000 each), it would seem far more cost effective to focus on those few counties with the largest waste streams or those counties with particular or unusual waste streams that might be most effectively recycled. This plan does neither, using a "shotgun" approach instead.

C. The Legislation Will Yield Unintended Results[9]

1. The Legislation Will Encourage, Rather Than Prevent, Illegal Dumping

Businesses and residents who cannot afford to leave the state and cannot afford this "surcharge" will be left with no choice but to illegally dump or destroy their solid waste. Thus, while the money generated from businesses and residents who actually pay the "surcharge" will be used for litter education and recycling initiatives, this legislation will most likely increase the risk of the unintended result that businesses and individuals will litter more and recycle less. The National Center for Environmental Decision-making Research notes that, "A study of the costs and benefits to illegal dumpers found that the cost of legal disposal must be decreased and the cost of illegal dumping penalties must be increased to reduce the volume of illegal dumping." www.ncedr.org/guides/litter/default.html.[10] Instead, this legislation proposes the opposite.

2. The Legislation Will Not Achieve Its Goal Of Keeping Waste Out Of Michigan And Will Harm Those Counties That Accept Such Waste

As discussed below, this legislation is also about discouraging the disposal of out-of-state waste by raising the cost of disposal. As discussed, the primary focus of this effort is to stop waste from Toronto from entering Michigan. However, reportedly, in entering into its disposal contract, Toronto foresaw this possibility and provided that the landfill in question could not charge it such a fee. Given the inability of Michigan to extraterritorially apply its laws, if the landfill is required to pay this, it will be forced to pass on the cost to its Michigan customers! However, pursuant to the ruling in *Lockwood v Nims*, 357 Mich 517 (1959), the State may not force the Michigan-based landfills and MSWI's to pay the surcharge if they are unable to collect it from their customers. This may be of particular concern where it has been rumored that certain out-of-state and Canadian waste sources included a provision in their contracts immunizing them from such a surcharge as is under consideration here. In such a case, the surcharge would have exactly the opposite result from what was intended - Canadian and out-of-state waste would not be charged the surcharge (unless the State of Michigan could find a way to legally pursue those generators) and Michigan residents would pay more for disposal than those out-of-state sources.

This legislation does nothing to address the concern of municipalities that already have agreements regarding waste collected from out of state. In fact, it will cost them money. These municipalities typically obtain a fee from disposal facilities based upon the solid waste disposed of,

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[9] There are a number of challenges that may be made to the Legislation including the impacts it may have by increasing the cost to Michigan businesses and the cumbersome and, in some cases, vague and ambiguous language used. These challenges are beyond the scope of this document but should be considered as part of the Legislature's analysis of the Legislation.

[10] *See also Survey of the Costs Associated with Illegal Dumping in Philadelphia*, Pennsylvania Economy League, Inc., Eastern Division, June, 1995, at 20 ("The cost of illegal dumping must be raised or the cost of dumping legally must be lowered"), *Illegal Dumping Prevention Guidebook*, U.S. Environmental Protection Agency Region 5, EPA 905-B-97-001, March 1998 ("Illegally dumped wastes are primarily non-hazardous materials that are dumped to avoid either disposal fees or the time and effort required for proper disposal.").

including that generated out of state. These municipalities count on this money for funding various local programs. This money, which municipalities budget for and rely upon, will now go to the state instead of the municipality. For example, last year, Berrien County received 3,557,167 cubic yards of solid waste from out of state. If that waste is eliminated due to the increase in cost from the legislation, it will mean the loss of up to $1,814,155 in revenue to the county. There are also municipalities which have similar impact fees under MCL 324.11532. Therefore, many units of local government will be harmed by this legislation.

VI. The Surcharge Violates The Commerce Clause

The legislation as drafted can be challenged under the Commerce Clause of the Federal Constitution, Article 1, § 8, Clause 3. The Commerce Clause empowers Congress to "regulate commerce with foreign nations, and among the several states." While the Commerce Clause affirmatively grants Congress the power to regulate interstate and foreign commerce, it also implicitly restrains the ability of the several states to discriminate against or impose substantial burdens upon interstate or foreign commerce. Courts refer to this limitation on a state's power to burden interstate commerce as the negative or "dormant" Commerce Clause. It is well-settled that solid waste is an article of commerce. *Fort Gratiot Sanitary Landfill, Inc v Mich Dept of Natural Res*, 504 US 353, 359 (1992).

A. The Legislation Has A Discriminatory Purpose

A statute can violate the Commerce Clause by discriminating against out-of-state interests in three different ways: a) facially, b) purposefully, or c) in practical effect. *Eastern Kentucky Resources v Fiscal Court of Magoffin County Kentucky*, 127 F3d 532, 540 (CA 6 1997). Where a statute is not discriminatory on its face, the court will look to whether the statute is purposefully discriminatory. In determining the true purpose behind a statute, a court can turn to the words of legislators which they used in enacting the provision:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often, these wishes are sufficient in and of themselves to determine the purpose of the legislation. In such cases, we have followed their plain meaning.

Id. at 542 citing, *Perry v Commerce Loan Co*, 383 US 392, 400 (1966). [W]here other sources, other than the state's own self-serving statement of its legislative intent, indicate the presence of actual and discriminatory purposes, a state's discriminatory purpose can be ascertained from sources." *Id.*, citing *Chambers Medical Technologies of South Carolina, Inc v Bryant*, 52 F3d 1252, 1259 (CA 4 1995). (See also the recent decision by a Michigan US District Judge in *The National Solid Waste Management Association v Wayne County*, Case No. 03-60188 (Feb 3, 2004). The court ruled Ordinance amendments unconstitutional because it was "persuaded that Defendents designed the Amendments, in large part, to keep Canadian trash out..."). Here, because the legislation on its face appears to be facially non-discriminatory, an analysis of the legislation's purpose must be made. The purpose behind the legislation is very clear – to keep foreign and out-of-state solid waste out of Michigan.

An article in the *Detroit Free Press* on December 15, 2003 illustrates the recycling and solid waste problems the State of Michigan faces. In discussing the legislation's $3.00 per ton fee, the article states that environmentalists support the fee "because it would raise up to $50 million for recycling programs and make shipping garbage to Michigan less economical for Canada and other states." www.freep.com/news/mich/trash15_20031215.htm. The article further states "this fee is part of a package of legislation designed to limit out-of-state garbage and boost recycling in Michigan." This recent article shows the generally understood purpose behind this $3.00 fee is to limit out-of-state and Canadian trash, therefore violating the Commerce Clause. Documents already considered by the Legislature support this same conclusion.

The Michigan Legislature's Beverage Container and Recycling Task Force ("Task Force") issued a 2003 report discussing various littering, recycling and waste issues in Michigan. In discussing the collection of fees for funding recycling programs, one of the stated reasons for the fee was "to control the flow of out-of-state waste." *Task Force Report*, pp. 28-29. Craig Lawrence, from Speedy-Q Markets, told the task force that "he was very concerned about Michigan's importation of Canadian waste that he believed that 'Michigan needs to **tax** its landfills more.'" *Id.* at 29. James Clift, from the Michigan Environmental Counsel, supported this and stated, "that a tipping fee on solid waste would serve the dual purpose of funding recycling programs and helping discourage out-of-state waste." It is apparent that this legislation was intended to limit foreign and out-of-state solid waste. Statements made by the Governor support this point as well.

The MDEQ released its *2003 Solid Waste Report* on February 2, 2004. This report indicates that 20% of solid waste disposed of in Michigan was imported. In response to this report, Governor Granholm stated, "In the wake of this report, it is now more imperative than ever that the legislature deliver to my desk the package of bills to curb the flow of out of state and foreign trash in Michigan. I think we can all agree that Michigan's quality of life is eroded a little bit more with every truck load of trash that is brought into our state. It is time for the legislature to move on the trash legislation." www.michigan.gov/deq/0,1607,7-135--85532--,00.html.

These statements by Governor Granholm, the Task Force and federal and state courts clearly show that this legislation violates the Commerce Clause. It is without a doubt that a significant purpose behind this $3 per ton fee is to make more expensive for Canada and other states the importing of solid waste into Michigan. This legislation satisfies the first test in determining whether a statute violates the "dormant" commerce clause (whether the legislation is discriminatory).

B. The Legislation Burdens Inter-State Commerce In Excess Of Local Putative Benefits

If for some reason, a court concluded that the legislation did not discriminate against inter-state commerce, there is the question of whether it "imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefits." *CSX Transportation, Inc v City of Plymouth*, 283 F3d 812, 818. The putative local benefits of this bill are to increase recycling, and to reduce littering. The question now is whether the burden on interstate commerce is excessive in comparison to these local benefits. The answer is yes.

The free flow of interstate and international solid waste would be crippled by this legislation. If all states enacted a similar tax, the effect would be to entirely stop interstate commerce in solid waste. This method of analysis (i.e., looking at what would happen if all states did the same thing) is

a valid and often used approach that courts have adopted. (*See U & I Sanitation v City of Columbus*, 205 F3d 1063, 1069 (CA 8 2000) in finding that the Commerce Clause was violated, stating "the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regime of other states and what effect would arise if not one, but many or every, state adopted similar legislation." [Internal citations omitted].)

C. The Legislation Violates The Commerce Clause Because Out-Of-State Solid Waste Generators Receive No Direct Benefit From Their Payment Of The Surcharge

An analysis of where the collected money is distributed also makes this legislation violative of the Commerce Clause. In *West Lynn Creamery, Inc, et al v Healy*, 512 US 186 (1994), the United States Supreme Court addressed a Massachusetts pricing order that charged a premium on all raw milk sold by dairy farmers (defined as "dealers") to Massachusetts retailers, regardless of whether the dairy farmers were in-state or out-of state. The money collected was used for several purposes, one of which was the monthly disbursement, as a subsidy, to Massachusetts dairy farmers. Thus, in effect, the pricing order was used to:

> enable higher cost Massachusetts dairy farmers to compete with lower cost dairy farmer in other states. The 'premium payments' are effectively a tax which makes milk produced out of state more expensive. Although the tax also applies to milk produced in Massachusetts, its effect on Massachusetts producers is entirely (indeed more than) offset by the subsidy provided exclusively to Massachusetts dairy farmers.

Id. at 195. The Supreme Court held that this scheme was unconstitutional as violative of the Commerce Clause.

The Court likened the scheme to a tax scheme at issue in *Bacchus v Imports, Ltd v Dias*, 468 US 263 (1984). There, the State of Hawaii imposed a tax on all liquor sales in Hawaii, but granted a tax exemption for local fruit, wine and brandy manufactured in Hawaii. The Court there held that this scheme was unconstitutional because goods produced out of state were taxed while those produced in state were subject to no net tax. The *Healy* Court noted, "[i]t is obvious that the result in *Bacchus* would have been the same if instead of exempting certain Hawaiian liquors from tax, Hawaii had rebated the amount of the tax collected from the sale of those liquors." *Healy*, 512 US at 197. Thus, the Court held, "if a discriminatory tax rebate is unconstitutional, Massachusetts' pricing order is surely invalid; for Massachusetts not only rebates to domestic milk producers the tax paid on the sale of Massachusetts milk, but also the tax paid on the sale of milk produced elsewhere." *Id.* In finding that the scheme violates the Commerce Clause, the Court found as a key piece of evidence the following fact:

> The pricing order in this case, however, is funded principally from taxes on the sale of milk produced in other states. By so funding the subsidy, [the state] not only assists local farmers, but burdens interstate commerce.

Id. at 199.

Under the foregoing analysis, the legislation at issue here also violates the Commerce Clause. The legislation creates a recycling incentives fund to reimburse the general fund for SBT tax incentives to encourage recycling. Under the projected figures, $5 million will go into the recycling incentives fund. Michigan businesses will receive back a portion of whatever surcharges they pay under the SBT tax incentives. They may also receive funding for recycling programs approved pursuant to the legislation. Because out-of-state waste generators will not recoup any of their payments into the fund, the legislation benefits domestic residents and businesses to the disadvantage of out-of-state businesses and residents. Because the legislation creates a situation where out-of-state generators pay money into a fund from which they receive absolutely no benefit, the legislation violates the Commerce Clause pursuant to *Healy* and *Bacchus.*

VII. The Surcharge Also Violates Other Constitutional Provisions As Well As United States Treaties

The legislation would violate other provisions of the United States Constitution as well as a number of United States treaties that promote free trade and equal treatment.

A. The Legislation Violates The Import-Export Clause Of The United States Constitution

This legislation violates the Import-Export Clause of the United States Constitution, Article 1, § 10, clause 2, which states that "no state shall, without the consent of Congress, lay any impost or duties or imports or exports, except what may be absolutely necessary for executing its inspection laws." The Import-Export Clause prohibits the states from imposing any tax on imported goods or on commercial activity except with Congressional consent. *Brown v Maryland*, 25 US 419 (1827). Congress has not consented to taxing solid waste from Canada. Thus, because the surcharge is really a tax, the legislation would likely violate the Import-Export Clause of the Constitution.

B. The Legislation Violates The 1986 Canada–United States Agreement On Transboundary Movement Of Hazardous Waste And NAFTA

This legislation also violates NAFTA and the 1986 Canada-US Agreement on the Transboundary Movement of Hazardous Waste (amended in 1992 to add municipal solid waste), both of which support free trade between Canada and the United States.

In a July 23, 2003 statement submitted to the U.S. House of Representatives Energy and Commerce Committee, the National Solid Wastes Management Association stated that bills to restrict the importation of solid waste from Canada would:

> raise serious questions about American responsibilities under the North American Free Trade Agreement, the General Agreement on Tariffs and Trade and the Canada-US Agreement on the Transboundary Movement of Hazardous Waste (amended to include solid waste). [Solid waste] may not be everyone's favorite commodity, but it is covered by the same free trade provisions that protect paper and cars and television sets. If we could close our borders to Canadian solid waste, what would prevent Canada from closing its borders to American hazardous waste? America exports substantial

> quantities of hazardous waste to Canadian disposal facilities. Michigan, in particular, is highly reliant on Canadian hazardous waste disposal capacity. If Michigan can ban Canadian [solid waste], why can't the Canadians be allowed to ban Michigan hazardous waste?

www.nswma.org/legislative/TestimonyWritten.Interstate.072303pdf.pdf. This highlights the ongoing debate regarding solid waste at the national level. It recognizes the very serious free trade concerns attendant to banning (or in this case taxing) solid waste.

1. The Canada-US Transboundary Agreement

Under the 1986 Transboundary Agreement ("Agreement") referenced in the quote above, a regulation which restricts the free flow of waste would go against the express purpose of the Agreement. The Agreement states that "the close trading relationship and the long common border between the United States and Canada engender opportunities for a generator of hazardous waste [and municipal solid waste] to benefit from using the nearest appropriate disposal facility, which may involve the transboundary shipment of hazardous [and municipal solid] waste." Further, the Agreement creates a "General Obligation" and provides that:

> The parties *shall* permit the export, import, and transit of hazardous [and solid] waste across their common border for treatment, storage, or disposal pursuant to the terms of their domestic laws, regulations and administrative practices, and the provisions of this Agreement.

Thus, the proposed legislation would violate the Agreement as it restricts the free flow of solid waste generated in Canada. Any argument that Michigan is not barring Canadian solid waste but is merely charging a fee fails because as set forth above, one of the reasons behind the Agreement was to reduce traveling distances of waste.

2. Conflict With The North American Free Trade Agreement

NAFTA also contains provisions barring regulations affecting the free flow of goods from Canada. n Chapter One, Article 102, the "Objectives" section of NAFTA, it is stated that one of the objectives is to "eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties." The proposed legislation very clearly violates this provision of NAFTA. The proposed legislation imposes a surcharge on Canadian solid waste. While it also applies an equal surcharge on non-Canadian solid waste, the effect of the surcharge on Canadian solid waste will be to force Canadian solid waste generators to keep their solid waste in Canada (which is one of the intended effects of the legislation). As such, the legislation does nothing to "facilitate" the cross-border movement of goods and services between Canada and the United States and, in fact, raises an impermissible barrier.

C. The Legislation Violates GATT

The Legislation violates the Most-Favored Nation Treatment afforded to Canada pursuant to General Agreement on Tariffs and Trade ("GATT"). Under Part 1, Article 1 of GATT, it was agreed as follows:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, . . .any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

This provision essentially requires that GATT countries treat other GATT countries similarly with respect to the importing and exporting of products. At its most basic level, the legislation at issue here imposes on Canadian solid waste generators a $3 per ton surcharge. Therefore, Mexico and Canada will not be similarly treated by the US if the legislation is passed. As such, the legislation clearly violates GATT.

VIII. Conclusion

Enactment of legislation to establish the proposed "surcharge" on solid waste for recycling is very likely to trigger lengthy and costly litigation in state and/or federal courts that is almost certain to result in this legislation being struck down. The legislation likely violates the Michigan Constitution, the United States Constitution, and international treaties:

- The surcharge is an illegal tax under Michigan law.
- The surcharge violates the Interstate Commerce Clause of the United States Constitution.
- The surcharge violates the Import-Export Clause of the United States Constitution.
- The surcharge violates the Canada-US Transboundary Agreement.
- The surcharge violates NAFTA.
- The surcharge violates GATT.

Beyond, violating numerous laws and international agreements, the $3 per ton "surcharge" is bad public policy. The legislation will likely lead to an increase in illegal dumping, will unfairly tax Michigan residents and businesses, and will do little to prevent out-of-state waste.

There are many other ways, including amendments to Public Act 138 of 1967, that the Legislature could enact to discourage littering and promote recycling without further harming Michigan businesses and residents suffering from the economic downturn Michigan has experienced the last three years. Thus, the Legislature should not pass a $3 per ton "surcharge."

MICHIGAN CHAMBER OF COMMERCE
LEGISLATIVE PRIORITIES
ON
ENVIRONMENTAL QUALITY

Issue: Environmental decision-making

Chamber Members Advocate:

- Establishing a scientific advisory board that could be called upon by the legislature to provide technical expertise on matters relating to environmental protection and natural resource management.

- Prohibiting operational memos that impose regulatory burdens without first processing those memoranda through the rulemaking process to ensure that they do not exceed the statutory authority provided by law.

- Conducting performance audits of environmental regulatory programs to ensure that maximum efficiency is being achieved.

- Supporting the continuation of the Department of Environmental Quality's Environmental Advisory Council (EAC) established in 2003. The EAC provides valuable expertise to the Department from a broad range of stakeholders. The EAC should remain as it is presently constituted with no formal decision making authority.

- Opposing creation of a "Environmental Quality Commission" that would allow non-elected appointees to set policy, unnecessarily delay and complicate the permitting process, and lessen accountability for departmental performance by removing a Governor's authority to appoint the director.

- Opposing state mercury regulations that are more restrictive than federal standards unless the benefit can be demonstrated through sound science and a cost-benefit analysis. A stringent and costly state mercury regulation that does not provide measurable environmental and health benefit, will put Michigan at a competitive disadvantage.

Why?
To maximize competitiveness, job providers need certainty in the regulatory process. New environmental regulations must be based on the best available science. Rules and regulations must go through a formal process and an opportunity for input must be available to a broad range of stakeholders.

Issue: Environmental fees

Chamber Members Advocate:

- Maintaining legislative oversight of environmental permit fees by determining fees in statute.

- Ensuring that the amount of fees charged does not exceed the reasonable cost of processing permit applications.

- Requiring that fees include performance guarantees to ensure that permit applications are processed in a timely manner.

- Opposing automatic annual increases in fees. Indexing undermines legislative oversight and leads to unnecessary increases in the size and cost of government.

Why?
Environmental protection is an important issue for both the general public and Michigan's job providers. Chamber members are willing to pay fees that have a direct link to the cost of necessary government services. However, the business community should not be required to carry the entire financial burden for all environmental protection programs and projects nor should employers be required to subsidize other programs and initiatives.

Issue: Water resources

Chamber Members Advocate:

- Providing for protection of the Great Lakes from harmful out-of-basin diversions through clarification of existing protective structures (Water Resources Development Act and the Great Lakes Charter for instance) and strengthening these mechanisms with additional measures as necessary.

- Supporting the activities of the Groundwater Advisory Council established under PA 148 of 2003. Additional state groundwater regulation should not be considered until the Council has completed its evaluations and issued its recommendations.

- Establishing reasonable water use requirements where necessary that are based on the level of risk to the water resource. Characteristics of risk may be associated with the type of aquatic system from which water is withdrawn, the location of withdrawal and/or time associated with water use.

- Opposing the July 19th 2004 draft of the Annex 2001. The Chamber does not support allowing other Great Lakes states to have binding decision-making authority over consumptive uses of water in Michigan. The combination of an uncertain decision making process and time delays would make Michigan a less desirable place for job providers.

- Opposing any permit system that is not based on sound science and that would unnecessarily drive up costs for water users. The requirements of the proposed

Water Legacy Act would impose an undue financial burden on thousands of water users.

Why?
Michigan's economy is heavily dependent on the availability and access to water resources. It is critical that the Great Lakes are protected from harmful diversions to help ensure that water and jobs remain in Michigan. At the same time, any further regulation of groundwater resources must balance the need for resource protection with the need to grow our economy.

Issue: Land Use

Chamber Members Advocate:

- Increasing certainty in the Brownfield Tax Credit process by making those credits of $200,000 or less self implementing. This will help to encourage the redevelopment of contaminated properties.

- Continuing support for Michigan's existing cleanup standards and liability provisions contained in Part 201 of the Natural Resources and Environmental Protection Act. Causation liability and risk-based clean up standards are essential components for a successful Brownfield clean-up program.

- Developing policies that encourage regional cooperation for planning and land use, including developing new revenue sharing approaches.

- Establishing "redevelopment readiness" standards to allow local units of government to be measured on performance and promote their ability to compete for private redevelopment investment.

- Supporting efforts to increase market options for housing within a local market. Developers should be given the opportunity to increase density in order to preserve open spaces.

- Opposing providing new regulatory powers to local units of government that are designed to increase the cost of development such as impact fees and urban growth boundaries. Existing land use problems are not caused by a lack of local government rules and ordinances.

Why?
Over the last several years Michigan has been consuming land at a higher rate than the population growth. To improve development patterns, protect critical land based industries (forestry, agriculture, tourism), and enhance overall quality of life, land use practices should be encouraged. Reasonable land use legislation should rely on the principles of protecting private property rights and allowing market forces to work.

Issue: Solid waste and recycling

Chamber Members Advocate:

- Developing a purposeful, incremental statewide strategy of waste reductio and litter control that will achieve cost effective results, including market development.

- Allow local communities to decide on reasonable local funding methods to support local recycling and waste reduction efforts including revisions to the Urban Cooperation Act.

- Opposing additional bans on items from landfills unless economically viable alternative disposal methods exist.

- Opposing a statewide solid waste tax (tipping fee). Such a tax would drive up the cost of doing business in Michigan.

- Opposing expansion of the bottle law. Expansion of the bottle bill would have a negative impact on Michigan's job providers.

Why?

Recycling is just one measure of how well the State is doing in minimizing the rate at which it generates waste. To improve, a purposeful, incremental strategy needs to be developed which will result in an affordable, cost-effective and efficient program to encourage Michigan residents and businesses to reduce waste generation and increase recycling.

Issue: Air Quality Standards

Chamber Members Advocate:

- Congressional passage of Clear Skies legislation to significantly improve environmental quality and provide regulatory certainty to the electric industry that allows for the orderly development of new generation.

- Requiring air permits to be issued within specific time frames. Major permits should be completed within 6 months; minor permits should be completed within 115 days.

- Authorizing the use of private sector contractors to facilitate the permit review process. Private sector consultants could help stabilize workforce needs of the Department of Environmental Quality (DEQ) and create a new high tech job market for the private sector.

- Replacing Michigan's Air Toxic Review program with federally approved Maximum Achievable Control Technology standards. Such a change could dramatically reduce

the time it takes to receive a permit while protecting public health with national recognized standards.

- Adopting a State Implementation Plan (SIP) that provides the most cost effective and balanced air pollution control measures and minimizes impacts on job providers. In all cases job providers should have the opportunity to review measures that may be included in the State Implementation Plan.

Why?

Many factors influence business location decisions. One key factor that can be controlled by state government is Michigan's overall regulatory climate. Both the timeliness and certainty of obtaining permits can have a major impact on investment decisions. The time it takes to receive an air permit to construct should be shortened to help enhance Michigan's overall business climate.

Water Policy Work Group
Model for "Improved Standards"
Designation: Mapping of Critical Aquifers – Use of Conflict Resolution Mechanism

Submitter: Doug Roberts, Jr. - Michigan Chamber of Commerce
Mike Johnston - Michigan Manufactures Association
Andy Such - Michigan Chemistry Council
Rob Anderson – Michigan Farm Bureau
Clayton Galarneau – Michigan Milk Producers Association
Ben Kudwa – Potato Growers of Michigan
Tom Frazier - Michigan Townships Association
Joe Fivas – Michigan Municipal League
Tom Hickson – Michigan Association of Counties
Ed Noyola – County Road Association of Michigan
Keith Carey – National Federation of Independent Business
Eric Rule – Michigan Retailers Association
Melissa Roy – Detroit Regional Chamber of Commerce
Jared Rodriguez – Grand Rapids Chamber of Commerce
Kevin Korpi – Michigan Forest Products Council
Bill Lobenherz – Michigan Soft Drink Association
Mike Frederick – Michigan Concrete Paving Association
Mike Newman – Michigan Aggregate Association
Mike Nystrom - Michigan Infrastructure & Transportation Association
Chuck Mills - Michigan Pavement Association
John Schmitt – Michigan Groundwater Association

Summary: In 2003 the Michigan Legislature enacted two significant pieces of legislation, Public Act 148 of 2003 (Groundwater Mapping) and Public Act 177 of 2003 (Conflict Resolution). The DEQ should focus their efforts on implementing these statutes to help protect Michigan's water resources.

PA 148 accomplished three important objectives:

1. Requires increased reporting from water users to improve the existing data set.
2. Requires the data based mapping of our groundwater by recognized scientific experts.
3. Establishes the Groundwater Conservation Advisory Council. The Council is charged with determining the sustainability of the state's groundwater use and whether the state should provide additional oversight of groundwater withdrawals based on scientific data.

PA 177 accomplished two important objectives:

1. Creates a mediation process to try and resolve conflicts between water users.
2. Gives the DEQ the authority, based on scientific evidence, to restrict water uses.

The legislature has provided comprehensive and meaningful enforcement powers to the DEQ to help protect the water resources of our state. These enforcement provisions include allowing the DEQ to restrict the water use of high capacity users (100,000 gallons or more per day).